UNITED STATES DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION WASHINGTON, DC

In the Matter of:

THOMAS FEDELE

FAA Order No. 98-3

Served: March 12, 1998

Docket No. CP94EA0289

DECISION AND ORDER

This case involves the allegation that a skydiver committed the dangerous act of jumping through or too close to clouds. Complainant Federal Aviation Administration (FAA) (Complainant) has appealed the law judge's decision¹ finding that Complainant failed to show a violation of the clearance-from-clouds requirements.² This decision reverses the law judge and assesses a \$500 civil penalty.

No person may make a parachute jump ... --

- (a) Into or through a cloud; or
- (b) When ... at a distance from clouds that is less than that prescribed in the following table:

Altitude

Distance from clouds

(1) * * *

(2) More than 1,200 feet above the surface but less than 10,000 feet MSL. 500 feet below. 1,000 feet above. 2,000 feet horizontal.

¹ A copy of the law judge's written initial decision is attached.

² Specifically, Complainant alleged that Fedele violated 14 C.F.R. §§ 105.29(a) and (b), which provide as follows:

Shortly after 3 p.m. on Saturday, April 30, 1994, Respondent Thomas Fedele (Fedele) jumped, with a group of close to 20 skydivers, from a Twin Otter aircraft owned and operated by the Skydiving Center of Greater Washington, D.C. The skydivers' landing spot was at St. Mary's County Airport in Leonardtown, Maryland.

Several observers completed incident reports indicating that the skydivers jumped through clouds, leading Complainant to investigate and later to file complaints seeking a \$500 civil penalty from each skydiver. Fedele's case was consolidated for hearing with that of the other skydivers. After a 2-day hearing in Washington, D.C., the parties settled the cases against each of the other skydivers, leaving only Fedele's case to be decided by the law judge. Fedele did not testify at the hearing, nor did anyone else, for either party, testify about his particular jump.

In his written initial decision, the law judge determined that Complainant had not shown that the cloud condition was such that no skydiver could have jumped at the time in question without descending through or too close to clouds. (Initial Decision at 21.) Furthermore, according to the law judge, even if the evidence showed that *some* of the skydivers jumped through or too close to clouds, Complainant had not proven that Fedele had done so. (*Id.*, at 22.) Accordingly, the law judge found that Complainant failed to prove that Fedele violated 14 C.F.R. § 105.29. (*Id.*)

Complainant has appealed, arguing that the law judge's findings are not in conformity with the reliable, probative, and substantial evidence in the record.

Complainant also argues on appeal that even though the law judge said that he was imposing the proper burden of proof -- that of a preponderance of the reliable,

probative, and substantial evidence -- he actually imposed a heavier burden of proof on Complainant.

Fedele urges the Administrator to deny Complainant's appeal and to affirm the law judge's decision. (Reply Brief at 1, 3.) Fedele argues that "this case is far from one where reasonable people cannot possibly differ." Fedele further contends that a "clear" preponderance of evidence does not show that the law judge made a mistake. (Id.) Fedele has misstated the standard of proof. The Rules of Practice say nothing about reasonable people not being able to differ. Nor do they require Complainant to prove its case by a "clear" preponderance of the evidence. Rather, the appropriate standard of proof is this: Complainant must prove its case by a preponderance of reliable, probative, and substantial evidence. 14 C.F.R. § 13.223. Likewise, a preponderance of reliable, probative, and substantial evidence must support each of the law judge's findings of fact. 14 C.F.R. § 13.233(b)(1).

The law judge did not err in discounting certain portions of Complainant's case, including the weather observations from other airports such as Richmond, Virginia and the readings from the Automated Weather Observing System (AWOS) at St. Mary's Airport. The weather observations from other locations are not all that probative in determining the cloud cover at St. Mary's Airport. As for the readings from the St. Mary's AWOS, it is unclear whether the inspector correctly recorded and converted the times from Universal Time Coordinated (UTC) to Eastern Daylight Time (EDT). (Tr. 212-13.) Under the circumstances, the law judge correctly held that these weather observations and the AWOS readings should be accorded little if any weight.

Nevertheless, a preponderance of reliable, probative, and substantial evidence still indicates that none of the skydivers on the Twin Otter could have jumped at the time and place in question without coming too close to clouds. Although most of the parties' witnesses had an interest in the case,³ the law judge found that one witness was disinterested and testified both "creditably and persuasively" concerning the cloud cover. (Initial Decision at 18.) That witness was a boy named Joshua Reithmeyer, who was 11 years old at the time of the incident. Fedele himself has admitted that Reithmeyer "had no axe to grind." (Letter dated July 3, 1996, to Judge Mathias from Respondent's Counsel, at p. 2.)

Reithmeyer testified that while he was on his way to the airport, he saw big, puffy, long clouds covering the entire airport. (Tr. 147.) He further testified that later, when he was standing near a hangar on the airport, he looked "straight up ... in front of [him] just a little bit" and saw the skydivers coming through the clouds. (Tr. 148.) The law judge discounted this portion of Reithmeyer's testimony due to the "packing effect," under which a human being looking off into the distance may see the clouds as more obscure than they actually are; however, Reithmeyer testified that he was looking "almost straight up," rather than off into the distance. (Id.) Consequently, the law judge should have given greater weight to Reithmeyer's testimony.

³ Based upon testimony regarding ill will between the airport authorities and the skydiving center, the law judge discounted the testimony of most of the airport observers. Likewise, the testimony offered by Respondents -- that of the Twin Otter pilot and the other skydivers, each of whom was facing an enforcement action -- was not disinterested either.

⁴ Complainant's other witnesses also testified that they saw the skydivers descend through the clouds. (See, e.g., Tr. 37-38, 70, 136.)

While Reithmeyer saw blue patches of sky, he testified that there were "very few" clear patches, and they were not over the airport, but were off to the side of the airport. (Tr. 151-52.) The landing spot for each of the skydivers, including Fedele, was on the airport. (See, e.g., Tr. 246.)

Reithmeyer's testimony must be examined in light of the safety regulations, which required Fedele and the other skydivers to keep a horizontal distance of 2,000 feet between themselves and any cloud at all times. 14 C.F.R. § 105.29(a). In other words, as the law judge noted, the hole in the clouds surrounding Fedele horizontally needed to have a diameter of at least 4,000 feet. (Initial Decision at 20.) The airport runway is 3,200 feet long, and the airport grounds extend a bit further than the runway. (Tr. 339.)

Given Reithmeyer's testimony and the fact that Fedele needed to be surrounded, at all times, by an opening in the clouds with a horizontal diameter of at least 4,000 feet, it is more probable than not that Fedele violated 14 C.F.R. § 105.29. The law judge erred in finding otherwise.

Jumping through or too near clouds is dangerous, as even Respondent's counsel admits. (Tr. 26-27.) Skydivers could collide with each other or with aircraft in the area; they could also land in water and drown. (*Id.*)

For the above reasons, the law judge's decision is reversed and a civil penalty of \$500 is assessed.⁵

ANE F. GARVEY, ADMINISTRATOR

Federal Aviation Administration

Issued this 10th day of March, 1998.

⁵ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1997).